

105TH CONGRESS
2D SESSION

S. 1713

To amend section 1926 of the Public Health Service Act to encourage States to strengthen their efforts to prevent the sale and distribution of tobacco products to individuals under the age of 18 and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 5, 1998

Mr. SMITH of Oregon introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

A BILL

To amend section 1926 of the Public Health Service Act to encourage States to strengthen their efforts to prevent the sale and distribution of tobacco products to individuals under the age of 18 and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Tobacco Use by Minors
5 Deterrence Act of 1998”.

1 **SEC. 2. AMENDMENT TO SECTION 1926 OF THE PUBLIC**
 2 **HEALTH SERVICE ACT.**

3 Section 1926 of the Public Health Service Act (42
 4 U.S.C. 300x-26) is amended to read as follows:

5 **“SEC. 1926. STATE LAWS REGARDING SALE OF TOBACCO**
 6 **PRODUCTS TO INDIVIDUALS UNDER THE AGE**
 7 **OF 18.**

8 “(a) MODEL LAW.—

9 “(1) IN GENERAL.—Subject to paragraph (2),
 10 for fiscal year 1999 and each subsequent fiscal year,
 11 the Secretary shall reduce, as provided in subsection
 12 (d), the amount of any grant under section 1921
 13 that does not have in effect a law with the following
 14 provisions:

15 **‘SECTION 1. DISTRIBUTION TO MINORS.**

16 ‘(a) IN GENERAL.—No person shall distribute a to-
 17 bacco product to an individual under 18 years of age. A
 18 person who violates this subsection is liable for—

19 ‘(1) a civil money penalty of \$25 for the first
 20 violation of this subsection;

21 ‘(2) a civil money penalty of \$50 for a second
 22 violation of this subsection; and

23 ‘(3) a civil money penalty of \$150 for a third
 24 and subsequent violation of this subsection.

25 ‘(b) EMPLOYERS.—The employer of an employee who
 26 has violated subsection (a) more than once while in the

1 employ of the employer is liable for a civil money penalty
2 of \$150 for each violation by such employee. An employer
3 who pays a civil money penalty under this subsection shall
4 not, for purposes of section 10, be considered as having
5 violated this Act.

6 ‘(b) DEFENSES.—It shall be a defense to a charge
7 brought under subsection (a) that—

8 ‘(1) the defendant—

9 ‘(A) relied upon proof of age that appeared
10 on its face to be valid, or

11 ‘(B) had complied with the requirements of
12 section 7, or

13 ‘(2) the individual to whom the tobacco product
14 was distributed was at the time of the distribution
15 employed in violation of section 8(b).

16 “(c) ENFORCEMENT.—A person who violates sub-
17 section (a) shall not be liable for a civil money penalty
18 unless the individual who received the tobacco product is
19 proceeded against under section 2(a), except that such a
20 person shall be liable for such penalty if such individual
21 was not proceeded against because such individual was
22 testing compliance with this Act under section 8(b).

1 **‘SEC. 2. PURCHASE, RECEIPT, OR POSSESSION BY MINORS**
2 **PROHIBITED.**

3 ‘(a) IN GENERAL.—An individual under 18 years of
4 age shall not purchase or attempt to purchase, receive or
5 attempt to receive, possess or attempt to possess, smoke
6 or attempt to smoke, or otherwise use or consume or at-
7 tempt to use or consume a tobacco product in a public
8 place. An individual who violates this subsection is liable
9 for a civil money penalty of not less than \$25 and not
10 more than \$150 for each violation and shall be subject
11 to suspension of the individual’s authorization to operate
12 a motor vehicle. Upon the second or subsequent violation
13 of this subsection, the authorization of such individual to
14 operate a motor vehicle shall be suspended for a period
15 of not less than 30 days and such individual shall be re-
16 quired to perform community service.

17 ‘(b) NOTICE.—A law enforcement agency, upon de-
18 termining that an individual under 18 years of age alleg-
19 edly purchased, received, possessed, smoked, or otherwise
20 used or attempted to purchase, receive, possess, smoke,
21 or otherwise use, a tobacco product in violation of sub-
22 section (a) shall notify the individual’s parent or parents,
23 custodian, or guardian as to the nature of the violation
24 if the name and address of a parent, guardian, or custo-
25 dian is reasonably ascertainable by the law enforcement
26 agency. The notice required by this subsection shall be

1 made not later than 48 hours after the individual who al-
2 legedly violated subsection (a) is cited by such agency for
3 the violation. The notice may be made by any means rea-
4 sonably calculated to give prompt actual notice, including
5 notice in person, by telephone, or by first-class mail.

6 ‘(c) EMPLOYMENT.—Subsection (a) does not prohibit
7 an individual under the age of 18 from possessing a to-
8 bacco product during regular working hours and in the
9 course of such individual’s employment if the tobacco
10 product is not possessed for such individual’s consump-
11 tion.

12 **‘SEC. 3. SIGNAGE.**

13 ‘It shall be unlawful for any person who sells tobacco
14 products over-the-counter to fail to post conspicuously a
15 sign communicating that—

16 ‘(1) the sale of tobacco products to individuals
17 under the age of 18 is prohibited by law,

18 ‘(2) the purchase of tobacco products by indi-
19 viduals under the age of 18 is prohibited by law, and

20 ‘(3) proof of age may be demanded.

21 A person who fails to post a sign in violation of this section
22 is liable for a civil money penalty of \$150 for each viola-
23 tion.

1 **‘SEC. 4. SAMPLING.**

2 ‘It shall be unlawful for any person to distribute to-
3 bacco product samples in any face-to-face transaction
4 without first procuring, from any prospective purchaser or
5 recipient who appears to be under the age of 18, proof
6 of age establishing that such prospective purchaser or re-
7 cipient is 18 years of age or older. A person who violates
8 this section is liable for a civil money penalty of \$150 for
9 each violation. This section does not apply to distributions
10 of tobacco products in an area or establishment that indi-
11 viduals under the age of 18 are not permitted to enter.

12 **‘SEC. 5. OUT-OF-PACKAGE DISTRIBUTION.**

13 ‘It shall be unlawful for any person to distribute ciga-
14 rettes or smokeless tobacco products other than in an un-
15 opened package originating with the manufacturer that
16 bears the health warning required by Federal law. A per-
17 son who distributes a cigarette or smokeless tobacco prod-
18 uct in violation of this section is liable for a civil money
19 penalty of \$150 for each violation.

20 **‘SEC. 6. DISPLAYS.**

21 ‘(a) GENERAL RULE.—It shall be unlawful for any
22 person who sells tobacco products to maintain packages
23 of such products in any display or storage configuration
24 which affords customers direct access to such packages.

1 ‘(b) PENALTY.—Any person who violates subsection
2 (a) is liable for a civil money penalty of \$150 for each
3 violation.

4 **‘SEC. 7. NOTIFICATION OF EMPLOYEES.**

5 ‘(a) NOTICE TO EMPLOYEES.—Within 180 days of
6 the effective date of this Act, every person engaged in the
7 business of distributing tobacco products at retail shall im-
8 plement a program to notify each employee employed by
9 that person who distributes tobacco products that this
10 Act—

11 ‘(1) prohibits the distribution of tobacco prod-
12 ucts to any individual under 18 years of age and the
13 purchase, receipt, possession, smoking, or other use
14 or consumption of tobacco products by any individ-
15 ual under 18 years of age,

16 ‘(2) prohibits out-of-package distribution of
17 cigarettes and smokeless tobacco products, and

18 ‘(3) permits a defense to a charge of distribu-
19 tion of a tobacco product to an individual under 18
20 years of age based on evidence that the defendant
21 relied upon proof of age that appeared on its face
22 to be valid.

23 Any employer failing to provide the required notice to any
24 employee shall be liable for a civil money penalty of \$150
25 for each violation.

1 ‘(b) STATEMENT.—It shall be a defense to a charge
2 that an employer violated subsection (a) of this section
3 that the employee acknowledged receipt, either in writing
4 or by electronic means, of a statement in substantially the
5 following form:

6 “I understand that State law prohibits the distribu-
7 tion of tobacco products to individuals under 18
8 years of age and out-of-package distribution of ciga-
9 rettes and smokeless tobacco products and permits
10 a defense based on evidence that a prospective pur-
11 chaser’s proof of age was reasonably relied upon and
12 appeared on its face to be valid. I understand that
13 if I sell, give, or voluntarily provide tobacco products
14 to an individual under the age of 18, I may be found
15 responsible for a civil money penalty of \$150 for
16 each violation. I promise to comply with this law.”

17 ‘(c) VICARIOUS LIABILITY.—If an employer is
18 charged with a violation of subsection (a) and the em-
19 ployer uses as a defense to such charge the defense pro-
20 vided by subsection (b), the employer shall be deemed to
21 be liable for such violation if such employer pays the pen-
22 alty imposed on the employee involved in such violation
23 or in any way reimburses the employee for such penalty.

1 **‘SEC. 8. RANDOM UNANNOUNCED INSPECTIONS; REPORT-**
2 **ING; AND COMPLIANCE.**

3 ‘(a) ENFORCEMENT AND INSPECTION.—The State
4 Police of a State, or such local law enforcement authority
5 duly designated by the State Police, shall enforce this Act
6 in a manner that can reasonably be expected to reduce
7 the extent to which tobacco products are distributed to
8 individuals under 18 years of age and shall conduct ran-
9 dom, unannounced inspections in accordance with the pro-
10 cedures set forth in this Act and in regulations issued
11 under section 1926 of the Public Health Service Act (42
12 U.S.C. 300x–26) to ensure compliance with this Act.

13 ‘(b) USE OF INDIVIDUALS UNDER 18.—The State
14 may engage an individual under 18 years of age to test
15 compliance with this Act, except that such an individual
16 may be used to test compliance with this Act only if the
17 testing is conducted under the following conditions:

18 ‘(1) Prior to use of any individual under the
19 age of 18 years in a random, unannounced inspec-
20 tion, written consent shall be obtained from such in-
21 dividual’s parents or legal guardian.

22 ‘(2) An individual under 18 years of age shall
23 act solely under the supervision and direction of the
24 State during a random, unannounced inspection.

25 ‘(3) An individual under 18 years of age used
26 in random, unannounced inspections shall not be

1 used in any such inspection at a store in which such
2 individual is a regular customer.

3 ‘(4) If an individual under 18 years of age par-
4 ticipating in random, unannounced inspections is
5 questioned about such individual’s age, such person
6 shall state such individual’s actual age and shall
7 present a true and correct proof of age if requested
8 at any time during the inspection to present it.

9 ‘(c) PENALTY.—Any person who uses any person
10 under 18 years of age, other than as permitted by sub-
11 section (b), to test compliance with this Act, is liable for
12 a civil money penalty of \$150 for each violation.

13 ‘(d) USE OF PENALTY MONEY AND FEES.—Civil
14 money penalties collected for violations of this Act and
15 fees collected under section 9 may only be used to defray
16 the costs of administration and enforcement of this Act.

17 **‘SEC. 9. LICENSURE.**

18 ‘(a) IN GENERAL.—The State shall require that each
19 person engaged in the distribution of tobacco products
20 hold a license issued under this section. A separate license
21 shall be required for each place of business where tobacco
22 products are distributed at retail. A license issued under
23 this section is not assignable and is valid only for the per-
24 son in whose name it is issued and for the place of busi-
25 ness designated in the license.

1 ‘(b) FEE.—The annual license fee shall be deter-
2 mined by the State for each place of business where to-
3 bacco products are distributed at retail.

4 ‘(c) APPLICATION.—Every application for a license,
5 including renewal of a license, under this section shall be
6 made upon a form provided by the State and shall set
7 forth the name under which the applicant transacts or in-
8 tends to transact business, the location of the place of
9 business for which the license is to be issued, the street
10 address to which all notices relevant to the license are to
11 be sent (in this Act referred to as ‘notice address’), and
12 any other identifying information that the State may re-
13 quire.

14 ‘(d) ACTION ON LICENSE.—The State shall issue or
15 renew a license or deny an application for a license or the
16 renewal of a license within 30 days of receiving a properly
17 completed application and the license fee. The State shall
18 provide notice to an applicant of action on an application
19 denying the issuance of a license or refusing to renew a
20 license.

21 ‘(e) SCOPE AND RENEWAL.—Every license issued by
22 the State shall be valid for 1 year from the date of
23 issuance and shall be renewed upon application except as
24 otherwise provided in this Act.

1 ‘(f) CHANGE OF ADDRESS.—Upon notification of a
2 change of address for a place of business for which a li-
3 cense has been issued, a license shall be reissued for the
4 new address without the filing of a new application.

5 ‘(g) NOTICE.—The State shall notify every person in
6 the State who is engaged in the distribution at retail of
7 tobacco products of the license requirement of this section
8 and of the date by which such person should have obtained
9 a license.

10 ‘(h) PENALTY.—

11 ‘(1) IN GENERAL.—Any person who engages in
12 the distribution at retail of tobacco products without
13 a license required by this section is liable for a civil
14 money penalty in an amount equal to two times the
15 applicable license fee and \$50 for each day on which
16 such distribution continues without a license.

17 ‘(2) SUSPENSION OR REVOCATION.—Any person
18 who engages in the distribution at retail of tobacco
19 products after a license issued under this section has
20 been suspended or revoked is liable for a civil money
21 penalty of \$100 per day for each day on which such
22 distribution continues after the date such person re-
23 ceived notice of such suspension or revocation.

24 ‘(i) TERM.—The term of a license shall be 1 year.

1 ‘(j) EFFECTIVE DATE.—No person shall engage in
2 the distribution at retail of tobacco products on or after
3 180 days after the date of enactment of this Act unless
4 the person is authorized to do so by a license issued pursu-
5 ant to this section or is an employee or agent of a person
6 who has been issued such a license.

7 **‘SEC. 10. SUSPENSION, REVOCATION, DENIAL, AND NON-**
8 **RENEWAL OF LICENSES.**

9 ‘(a) NOTICE.—Upon a finding that a licensee has
10 been determined by a court of competent jurisdiction to
11 have violated this Act during the license term, the State
12 shall notify the licensee in writing, served personally or
13 by registered mail at the notice address, that any subse-
14 quent violation of this Act at the same place of business
15 may result in an administrative action to suspend the li-
16 cense for a period determined by the State.

17 ‘(b) SUSPENSION.—Upon finding that a further vio-
18 lation by the licensee has occurred involving the same
19 place of business for which the license was issued and the
20 licensee has been provided notice under subsection (a), the
21 State may initiate an administrative action to suspend the
22 license for a period to be determined by the State. If an
23 administrative action to suspend a license is initiated, the
24 State shall immediately notify the licensee in writing at
25 the notice address of the initiation of the action and the

1 reasons therefore and permit the licensee an opportunity,
2 at least 30 days after written notice is served personally
3 or by registered mail upon the licensee, to show why sus-
4 pension of the license would be unwarranted or unjust.

5 ‘(c) REVOCATION.—The State may initiate an admin-
6 istrative action to revoke a license that previously has been
7 suspended under subsection (b) if, during the one year pe-
8 riod in which the license was issued, a further violation
9 of this Act is committed after the suspension by the li-
10 censee involving the same place of business for which the
11 license was issued. If an administrative action to revoke
12 a license is initiated, the State shall immediately notify
13 the licensee in writing at the notice address of the initi-
14 ation of the action and the reasons therefore and permit
15 the licensee an opportunity, at least 30 days after written
16 notice is served personally or by registered mail upon the
17 licensee, to show why revocation of the license would be
18 unwarranted or unjust.

19 ‘(d) OTHER VIOLATIONS.—No action with respect to
20 any license at a place of business may be taken based on
21 a violation that occurred subsequent to the occurrence of
22 another violation unless such other violation is fully adju-
23 dicated at the time the subsequent violation occurred.

24 ‘(e) FEE.—A person whose license has been sus-
25 pended or revoked with respect to a place of business pur-

1 suant to this section shall pay the State a fee of \$50 for
2 the renewal or reissuance of the license at that same place
3 of business.

4 ‘(f) EFFECT ON APPLICATION FOR NEW LICENSE.—
5 Revocation of a license under subsection (c) with respect
6 to a place of business shall not be grounds to deny an
7 application by that person for a new license with respect
8 to that place of business for more than 12 months subse-
9 quent to the date of such revocation. Revocation or sus-
10 pension of a license with respect to a particular place of
11 business shall not be the grounds to deny an application
12 for a new license, to refuse to renew a license, or to revoke
13 or suspend an existing license at another place of business.

14 ‘(g) JUDICIAL REVIEW.—A licensee may seek judicial
15 review of an action of the State suspending, revoking, de-
16 nying, or refusing to renew a license under this section
17 by filing a complaint in a court of competent jurisdiction.
18 A complaint shall be filed within 30 days after the date
19 on which notice of the action is received by the licensee.
20 The court shall review the evidence de novo.

21 ‘(h) REPORT.—The State shall not report any action
22 suspending, revoking, denying, or refusing to renew a li-
23 cense under this section to the Secretary of Health and
24 Human Services, unless judicial review, if any, of the ac-
25 tion has been completed.

1 **‘SEC. 11. PREEMPTION.**

2 ‘(a) IN GENERAL.—The provisions of this Act shall
3 not preempt any provisions of State or local law that pro-
4 vide greater restrictions than those required in this Act.

5 ‘(b) FOOD AND DRUG ADMINISTRATION.—Nothing in
6 this Act shall be construed to prohibit the Food and Drug
7 Administration from regulating tobacco as a drug.

8 **‘SEC. 12. SEVERABILITY.**

9 ‘If any provision of this Act or its application to any
10 person or circumstance is held invalid, such holding shall
11 not affect other provisions or applications of this Act that
12 can be given effect without the invalid application.

13 **‘SEC. 13. NO PRIVATE RIGHT OF ACTION.**

14 ‘Nothing in this Act shall be construed to create a
15 right of action by any private person for any violation of
16 any provision of this Act.

17 **‘SEC. 14. JURISDICTION AND VENUE.**

18 ‘Any action alleging a violation of this Act may only
19 be brought in a court of general jurisdiction in the city
20 or county where the violation is alleged to have occurred.

21 **‘SEC. 15. REPORT.**

22 ‘The State shall prepare for submission annually to
23 the Secretary of Health and Human Services the report
24 required by section 1926 of the Public Health Service Act
25 (42 U.S.C. 300x–26) and otherwise shall be responsible
26 for the State’s reporting of compliance with that section

1 and any implementing regulations promulgated by the
2 Secretary.

3 **‘SEC. 16. DEFINITIONS.**

4 ‘For purposes of this Act:

5 ‘(1) DIRECT ACCESS.—The term “direct ac-
6 cess” means the ability of a customer to obtain
7 physically a package of tobacco products without the
8 intervention of an employee of the establishment.

9 ‘(2) PACKAGE.—The term “package” means a
10 pack, box, carton, pouch, or container of any kind
11 in which cigarettes or smokeless tobacco products
12 are offered for sale, sold, or otherwise distributed to
13 consumers.

14 ‘(3) PROOF OF AGE.—The term “proof of age”
15 means a driver’s license or other form of identifica-
16 tion issued by a governmental authority or other
17 identification that includes a photograph and the
18 date of birth of the individual.

19 ‘(4) SAMPLE.—The term “sample” means a to-
20 bacco product distributed to members of the public
21 at no cost for the purpose of promoting the product,
22 but excludes tobacco products distributed—

23 ‘(A) in conjunction with the sale of other
24 tobacco products,

1 ‘(B) to consumer or market research pan-
2 els,

3 ‘(C) to persons employed in the trade, or

4 ‘(D) to customers or consumers in re-
5 sponse to customer or consumer complaints.

6 ‘(5) TOBACCO PRODUCT.—The term “tobacco
7 product” means—

8 ‘(A) “tobacco products” as defined in sec-
9 tion 5702 of the Internal Revenue Code of
10 1986, or

11 ‘(B) any other product containing tobacco
12 as a principal ingredient which, because of its
13 appearance, type, or tobacco used in the prod-
14 uct, or its packaging and labeling, is likely to
15 be offered to, or purchased by, consumers as a
16 tobacco product as described in subparagraph
17 (A).’.

18 “(2) DELAYED APPLICABILITY FOR CERTAIN
19 STATES.—In the case of a State whose legislature
20 does not convene a regular session in fiscal year
21 1999, the requirement described in paragraph (1) as
22 a condition of avoiding a reduction in a grant under
23 section 1921 shall apply only for fiscal year 2000
24 and subsequent fiscal years.

25 “(b) ENFORCEMENT.—

1 “(1) IN GENERAL.—For the first applicable fis-
 2 cal year and for each subsequent fiscal year, a fund-
 3 ing agreement for a grant under section 1921 of the
 4 Public Health Service Act is a funding agreement
 5 under which the State involved will—

6 “(A) enforce the law described in sub-
 7 section (a)(1) systematically and conscientiously
 8 and in a manner that can reasonably be ex-
 9 pected to reduce the extent to which tobacco
 10 products are available to individuals under the
 11 age of 18; and

12 “(B) certify that it requires such enforce-
 13 ment of such law to be treated as a priority by
 14 State and local law enforcement authorities.

15 “(2) ACTIVITIES AND REPORTS REGARDING EN-
 16 FORCEMENT.—For the first applicable fiscal year
 17 and for each subsequent fiscal year, a funding agree-
 18 ment for a grant under section 1921 is a funding
 19 agreement under which the State involved will—

20 “(A) conduct random, unannounced in-
 21 spections to ensure compliance with the law de-
 22 scribed in subsection (a)(1); and

23 “(B) annually submit to the Secretary a
 24 report describing—

1 “(i) the activities carried out by the
2 State to enforce such law during the fiscal
3 year preceding the fiscal year for which the
4 State is seeking the grant;

5 “(ii) the steps taken by the State to
6 ensure that enforcement of such law was
7 treated as a priority by State and local law
8 enforcement authorities;

9 “(iii) the extent of success the State
10 has achieved in reducing the availability of
11 tobacco products to individuals under the
12 age of 18, including the results of the in-
13 spections conducted under subparagraph
14 (A); and

15 “(iv) the strategies to be utilized by
16 the State for enforcing such law during the
17 fiscal year for which the grant is sought.

18 “(c) FUNDING.—The law specified in subsection
19 (a)(1) may be administered and enforced by a State
20 using—

21 “(1) any amounts made available to the State
22 through a grant under section 1921;

23 “(2) any amounts made available to the State
24 under section 1901 (42 U.S.C. 300w);

1 “(3) any fees collected for licenses issued pursu-
2 ant to the law described in subsection (a)(1);

3 “(4) any fines or penalties assessed for viola-
4 tions of the law specified in subsection (a)(1); or

5 “(5) any other funding source that the legisla-
6 ture of the State may prescribe by statute.

7 “(d) NONCOMPLIANCE OF STATE.—Before making a
8 grant under section 1921 to a State for the first applicable
9 fiscal year or any subsequent fiscal year, the Secretary
10 shall make a determination whether the State has main-
11 tained compliance with subsections (a) and (b). If, after
12 notice to the State and an opportunity for a hearing, the
13 Secretary determines that the State is not in compliance
14 with such subsections, the Secretary shall reduce the
15 amount of the allotment under such section for the State
16 for the fiscal year involved by an amount equal to—

17 “(1) in the case of the first applicable fiscal
18 year, 10 percent of the amount determined under
19 section 1933 for the State for the fiscal year;

20 “(2) in the case of the first fiscal year following
21 such applicable fiscal year, 20 percent of the amount
22 determined under section 1933 for the State for the
23 fiscal year;

1 “(3) in the case of the second such fiscal year,
2 30 percent of the amount determined under section
3 1933 for the State for the fiscal year; and

4 “(4) in the case of the third such fiscal year or
5 any subsequent fiscal year, 40 percent of the amount
6 determined under section 1933 for the State for the
7 fiscal year.

8 “(e) DEFINITION.—For purposes of this section, the
9 term ‘first applicable fiscal year’ means—

10 “(1) fiscal year 2000, in the case of any State
11 described in subsection (a)(2); and

12 “(2) fiscal year 1999, in the case of any other
13 State.

14 “(f) APPLICATION.—For purposes of this section, ref-
15 erences to section 1921 shall include any successor grant
16 programs.”.

17 **SEC. 3. EFFECTIVE DATE.**

18 This Act and the amendments made by this Act shall
19 take effect on January 1, 2000.

○